UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation,

Plaintiffs,

v.

KEITH E. MILNER and SHIRLEY A. MILNER, et al.,

Defendants,

THE LUMMI NATION,

Intervenor-Plaintiff.

NO. C01-809R

ORDER GRANTING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT RE: TRESPASS AND RHA CLAIMS

THIS MATTER comes before the court on Plaintiffs' motions for summary judgment. Having reviewed the pleadings filed in support of and in opposition to these motions, the court finds and rules as follows:

I. BACKGROUND

Defendants Keith E. and Shirley A. Milner, Mary D. Sharp, Brent C. and Mary K. Nicholson, and Ian C. and Marcia A. Boyd own beachfront property on Sandy Point, in Whatcom County, Washing-

ton.[1] Defendants' property is fronted by various shore defense structures that allegedly encroach on tidelands on the Strait of Georgia that are owned by the United States in trust for the Lummi Nation. The United States also alleges that these structures are being maintained in violation of the Rivers and Harbors Act ("RHA").[2] Together, the United States and Lummi Nation move for summary judgment on the trespass claim. The United States moves separately for summary judgment on its RHA claim.

II. DISCUSSION

A. Summary judgment standard

Summary judgment is appropriate when "the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). While the moving party has the initial burden to establish the absence of any genuine issues of fact, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

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[1] Defendants Harry F. Case and Donald C. and Gloria Walker are not involved in this motion as they have reached a settlement in principle with the government. That settlement, however, has not yet been approved by the Assistant Attorney General. Consequently, the United States reserves the right to move against these defendants in the future.

[2] A third cause of action under the Clean Water Act is not at issue in these motions.

Rather, the nonmoving party must respond by "set[ting] forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(c). "Where the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec., 475 U.S. at 587.

B. Liability for trespass

The parties agree that the federal law of trespass applies in this case. See United States v. Pend Oreille Pub. Util. Dist. No. 1, 28 F.3d 1544, 1550 n.8 (9th Cir. 1994) (federal law applies to trespass cause of action protecting Indian lands); Oneida County v. Oneida Indian Nation, 470 U.S. 226, 236 (1985). That law generally comports to the Restatement of Torts. See United States v. West, 232 F.2d 694, 699 (9th Cir. 1956) (adopting Restatement (First) of Torts for operative definition of federal trespass); U.S. v. Osterlund, 505 F. Supp. 165, 167 (D.C. Colo. 1981). Under the Restatement, a person trespasses when he "intentionally . . . causes a thing [to enter another's land] . . . remains on the land or . . . fails to remove from the land a thing which he is under a duty to remove." Restatement (Second) of Torts § 158.

In the present case, uncontested topographic maps demonstrate that as of January 2002, portions of Defendants' shore defense structures were seaward of the line of mean high water, which this court has determined to be Defendants' boundary line. Ex. 1, United States Mot. Summ. J.; Order Granting United States'

and Harry F. Case's Motion for Partial Summary Judgment at 6 (Dec. 16, 2002). Despite having received notice from the government that these structures are on United States land, Exs. 3-10, United States' Mot. Summ. J.,[3] Defendants have not removed them. Nor do Defendants present any specific evidence that the shore defense structures are not currently encroaching on the government's land. Instead, Defendants merely state in a conclusory fashion that since January 2002, the boundary has shifted such that their shore defense structures do not currently encroach. Absent any such specific evidence, however, Defendants fail to create a genuine issue of fact as to whether the shore defense structures are currently encroaching. Matsushita Elec., 475 U.S. at 586 (nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts").

Instead, Defendants attempt to persuade the court that they cannot be held liable for trespass because they never intended their shore defense structures to encroach onto the tidelands.[4] According to Defendants, the ambulatory nature of the boundary was the cause of the trespass. Defendants liken their situation

[3] Defendants object to these exhibits, which consist of letters from the Army Corps of Engineers and the Department of Justice to individual defendants and excerpts of various Defendants' depositions, as being inadmissible hearsay and improperly authenticated. These items, however, are not hearsay as they are not offered for the truth of the matter that Defendants are trespassing but rather that they received demands by the government to remove the allegedly offending structures.

[4] Defendants have failed to persuade the court with this argument on at least two previous occasions.

to the party in a Restatement illustration who piles logs on his land by the side of a stream well above the high-water mark, which are subsequently carried away by an unprecedented freshet. In the illustration, that party is not liable to a party downstream on whose lands the logs are deposited. Restatement (Second) of Torts § 166 ill. 3. According to Defendants, all of their shore defense structures were originally placed on their own property with subsequent natural events creating the trespass.

Defendants, however, overlook the fact that to be liable, they need not have necessarily intended the actual trespass but that it is enough that they (or their predecessors[5]) acted with knowledge that constructing the shore defense structures would, with substantial certainty, result in entry of portions of the structures onto the tidelands. Id. § 158 cmt. i. In the present case, as littoral owners, Defendants took their property "with the knowledge that the boundary may change by accretion or reliction." Michaelson v. Silver Beach Improvement Ass'n, 173 N.E.2d 273, 278 (Mass. 1961). Defendants, therefore, are more like "one who so piles sand close to his boundary that by force of gravity alone it slides down onto his neighbor's land, or who so builds an embankment that during ordinary rainfalls the dirt

[5] The Defendants are liable for trespass even in the case where their predecessors tortiously placed the structures and the Defendants fail to remove them. Restatement (Second) of Torts § 161(2).

from it is washed upon adjacent lands," Restatement (Second) of Torts § 158 cmt. i, than they are like one who piles logs in the face of an unprecedented freshet.[6]

Defendants also overlook the fact that they have failed to remove the encroaching parts of the shore defense structures even after the government requested them to do so. In such a situation, the intention element is satisfied. New York State Energy Research and Dev. Auth. v. Nuclear Fuel Servs., Inc., 561 F. Supp. 954, 974 (W.D.N.Y. 1983) ("In the case of trespass through the continuing presence of chattels on another's land, the requisite intent does not arise until the duty to remove the chattels arises, which does not occur until a demand for removal has been made."). Accordingly, Defendants are liable for trespass.

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[6] Defendants contend that they are not liable for trespass under the common enemy doctrine. Under that doctrine, a landowner is entitled to build structures to repel the erosive effects of water. A landowner who builds such structures is generally not held liable for trespass when the consequences and effects of those structures injure another's property. That is not the case at bar, however, because Defendants' shore defense structures themselves are physically located on the government's property. Under the common enemy doctrine, a landowner is simply not entitled to enter onto another's land in order to build or maintain his defensive structures.

Similarly, the cases that Defendants amass for the proposition that there can be no trespass when acts taken on one's own property cause unintended harm to another's property are inapposite. See Cannon v. Dunn, 700 P.2d 502 (Ariz. 1985); Hicks v. Drew, 49 P. 189 (Cal. 1897); Schulze v. Monsanto Co., 782 S.W.2d 419 (Mo. App. 1989). As above, none of these cases sanction an actual physical encroachment but rather only consider a "constructive" trespass whereby affects and consequences cause injury to land.

C. Liability under RHA

Section 10 of the RHA makes it unlawful "to build or commence the building of any . . . breakwater, bulkhead . . . or other structures in any . . . water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army." Section 10 also makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." 33 U.S.C. § 403.

Courts have interpreted Section 10 to also make unlawful the maintenance of structures restricted by the Act.[7] United States

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[7] Defendants contend that they cannot be liable under the RHA because they did not intend to obstruct any navigable water or build any structure in a navigable water. Their citation to U.S. v. Ohio Barge Lines, Inc., 607 F.2d 624 (3d Cir. 1979) and United States v. Bigan, 274 F.2d 729 (3d Cir. 1960) for the proposition that the RHA requires some intent and active contribution to the erection of the obstruction is unpersuasive in light of recent Ninth Circuit case law.

A similar argument to Defendants was rejected by the court in United States v. Alleyne, 454 F. Supp. 1164 (D.C.N.Y. 1978). In that case, the court clarified the nature of the "intent" needed to be liable under Section 10. According to the court, "it is [not] necessary that the purpose be to create an obstruction, but that such a result is reasonably to be apprehended from the acts actually intended wholly irrespective of whether or not there was a design to create an obstruction to navigation." 454 F. Supp. at 1171 (quoting United States v. Bridgeport Towing Line, Inc., 15 F.2d 240, 241 (D. Conn. 1926). Consequently, all that is necessary is that the obstruction to navigation be "reasonably foreseeable." Id. In the present

v. Alameda Gateway, Ltd., 953 F. Supp. 1106, 1110 (N.D. Cal. 1996) ("To deem the RHA inapplicable to pre-existing structures would sharply restrict the ability of the government to preserve the public interest in maintaining unimpeded access to the navigable waters of the United States."); see also United States v. Alameda Gateway, Ltd., 213 F.3d 1161, 1167 (9th Cir. 2000) (holding that the RHA allows the United States to remove structures that were once erected lawfully but subsequently found to be obstructions). Given that Defendants are maintaining the structures (i.e. they have not removed them), they are liable under the RHA for those parts of the structures that are below MHW. See Leslie Salt Co. v. Froehlke, 578 F.2d 742, 753 (9th Cir. 1978) (holding that "in tidal areas, 'navigable waters of the United States,' as used in the Rivers and Harbors Act, extend to all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state"). Furthermore, the structures also modify the course, location, and condition of a navigable water.

As demonstrated by the topographic maps submitted by the government, as of January 2002, parts of Defendants' shore defense structures lie seaward of MHW in its natural and unobstructed state. Consequently, the Defendants are liable for

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case, it was reasonably foreseeable that erosion would one day impact the shore defense structures so that they would be located seaward of MHW and be considered obstructions to navigation.

violations of the RHA.[8]

D. Remedy

Plaintiffs seek an injunction against Defendants to remove any part of the shore defense structures that lie below MHW, having waived damages. Such an injunction is available for both the trespass and the RHA violation. 33 U.S.C. § 406 (injunction available to remove structures erected in violation of Section 10 of the RHA).

Defendants urge that any injunction from this court be only for them to apply for after-the-fact permits for the shore defense structures. Despite having some flexibility in shaping the scope of relief, United States v. Illinois Terminal R.R. Co., 501 F. Supp. 18, 21 (E.D. Mo. 1980) ("The federal courts have not limited enforcement of the River and Harbor Appropriation Act to

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[8] Defendants misread Section 10 to require a showing that the shore defense structures actually obstruct the navigable capacity of the Strait of Georgia. Instead, the structures listed in the second and third clauses of Section 10 (i.e. bulkheads, breakwaters, and other structures) "are presumed to be obstructions to navigable capacity . . . . When one undertakes any of the activities described in clause 2 or by his activities brings about any of the results specified in clause 3, he violates Section 10 if he has not first sought and obtained a permit from the Corps of Engineers." Sierra Club v. Andrus, 610 F.2d 581, 594-95 (9th Cir. 1979), rev'd on other grounds sub nom. California v. Sierra Club, 451 U.S. 287 (1981). "[T]o fall within the prohibition of clause 2, it need only be shown that the subject in question is one of those enumerated in Section 10." United States v. Boyden, 696 F.2d 685, 688 (9th Cir. 1983); see also United States v. Joseph G. Moretti, Inc., 478 F.2d 418, 429 (5th Cir. 1973) ("any argument that the filling of navigable waters does not reduce navigable capacity of the filled waterway and thereby constitute an obstruction within the meaning of § 403 borders on the frivolous.").

the criminal and injunctive remedies provided in § 406. . . . Congress . . . has provided enough federal law in (33 U.S.C. § 403) from which appropriate remedies may be fashioned even though they rest on inferences."),[9] the court declines to issue such an injunction. First, such an injunction would not remedy the trespass. Second, regulations authorizing such after-the-fact permits were rescinded by the Corps in 1977. 42 Fed. Reg. 37,122, 37,133 (July 19, 1977) (repealing 33 C.F.R. § 209.120, which included a provision, Section 209.120(c)(iv), for granting after-the-fact permits). Accordingly, if the court issues an injunction, it must be for the removal of the shore defense structures.

Under the RHA, to obtain an injunction, the government need not show irreparable injury and the court need not balance any interests. United States v. Stoeco Homes, Inc., 498 F.2d 597, 611 (3d Cir. 1974) ("No balancing of interest or need to show irreparable injury is required when an injunction is sought under § 12 to prevent erection or seek removal of an unlawful structure.") (dicta); United States v. Ciampitti, 583 F. Supp. 483, 498 (D.N.J. 1984) (citing Stoeco Homes); United States v. Alleyne, 454 F. Supp. 1164, 1170 (D.C.N.Y. 1978); United States

[9] That flexibility is limited, however, to seeking only criminal penalties or some form of an injunction as "the Corps does not have the authority to compensate parties injured by . . . illegal activities." Potomac River Ass'n, Inc. v. Lundeberg Maryland Seamanship School, Inc., 402 F. Supp. 344, 357 (D. Md. 1975).

v. Underwood, 344 F. Supp. 486, 494 (D.C. Fla. 1972). Consequently, the only remaining equitable considerations in issuing an injunction are (1) the nature of the interest to be protected, (2) any unreasonable delay in initiating the action, (3) any related misconduct on the government's part, and (4) the practicability of framing and enforcing the injunction. Restatement (Second) Torts § 936(1); see also United States v. Sexton Cove Estates, Inc., 526 F.2d 1293, 1301 (5th Cir. 1976) ("The degree and kind of wrong and the practicality of the remedy must be considered in the formulation of that remedy.").[10]

In the present case, it is largely undisputed that the shore defense structures have negative environmental consequences. Johannessen Decl., Gov't Ex. 12 at 86:18-87:8 (negative effects of Defendants' shore defense structures include increased scouring of the beach in front of the structures, increased wave turbulence, a coarsening of the beach that tends to displace potential surf smelt spawning areas, and reducing sediment downdrift that nourishes beach habitats to the south of the structures). In light of the violation of the RHA, an injunction to remove the structures seaward of MHW is appropriate.[11] As the

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[10] The court finds that there was no unreasonable delay by the government. Nor has the government engaged in any related misconduct.

[11] In fashioning the remedy, the court finds United States v. Sunset Cove, Inc., 514 F.2d 1089 (9th Cir. 1975), instructive. In that case, a developer constructed riprap below MHW in violation of 33 U.S.C. § 403 along a shoreline with an ambulatory boundary. The developer, much like the Defendants in the present

trespass claim is coextensive with the RHA claim, an injunction under Section 406 makes unnecessary a remedy for the trespass claim given the government's waiver of all damages.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' motions for summary judgment [docket no. 224-1 & 231-1] are GRANTED. It is hereby adjudged and ORDERED that:

(1) Defendants shall promptly remove all rock, riprap, and other shore defense structures that are located seaward of MHW as that line is determined on the government's January 2002 survey. Such removal shall be supervised by the Chief of Engineers of the Army Corps of Engineers or his designee.

(2) As MHW moves up and down the shore, Defendants shall promptly, at the request of the government, remove all rock, riprap, and other shore defense structures that become located seaward of MHW, as that point is determined by subsequent surveys. Such removal shall be supervised by the Chief of Engineers of the Army Corps

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case, installed the riprap to protect against erosion. The district court, having found a violation of Section 403, issued an injunction for the developer to remove all of the fill. In affirming the injunction, the Ninth Circuit modified it so that the defendants would only have to remove enough riprap to "permit nature, in a reasonable period of time, to take its course and approximately re-establish former topographic conditions." 514 F.2d at 1090.

of Engineers or his designee.

(3) The government shall pay for any future survey establishing MHW for the purposes of this order. If such survey reveals that certain structures are located seaward of MHW, any defendant whose property is fronted by those structures shall jointly and severally compensate the United States for the cost of that survey.

(4) At anytime, the government can remove any structures located seaward of MHW and obtain joint and several compensation from the Defendants whose property is fronted by the offending structures.

DATED at Seattle, Washington this 16th day of June, 2003.

Barbara Jacobs Rothstein

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE